

## Section 2.66.030 Objectives.

The Cambridge Employment Plan has the following objectives:

A. To ensure that local resources are wisely invested in those applicable areas where there is maximum promise that the benefits that accrue, including employment opportunities, will be made available to City residents;

B. To maintain and to increase, whenever possible, ~~the current percentage of~~ City jobs held by City residents ~~(twenty-five percent)~~, by promoting the hiring of qualified unemployed and underemployed City residents;

C. To promote the hiring of qualified unemployed and underemployed women and minorities who are City residents;

D. To provide employers with a central location for disseminating and receiving information on all facets of employment and training resources in the City.

E. To provide employment information, opportunities and training for unemployed and underemployed youth who are City residents. (Ord. 1103 (part), 1990; Ord. 1005 (part), 1984; prior code Ch. 24 § 24-3)

Section 2.66.060 Construction projects--  
Worker qualifications.

A. On any construction project which is funded in whole or in part by City, State or federal funds, or funds which, in accordance with a federal grant, the City expends or administers, or in which the City is a signatory to the construction contract, the worker hours shall be performed as follows:

~~1. No less than twenty-five percent of the total employee worker hours shall be performed by bona fide Cambridge residents.~~

21. No less than twenty-five percent of the total employee worker hours shall be performed by minority persons.

32. No less than ten percent of the total employee worker hours shall be performed by women.

B. This section shall not apply to housing rehabilitation projects including eight or fewer. (Ord. 1053 (part), 1987: prior code § 24-6)

2.66.070 Compliance, enforcement,  
sanctions.

A. All contractors entering into construction contracts covered by Article II of this chapter shall:

1. Certify that they know of the provisions of said Article and that they intend to comply with them;

2. List all job openings with the Employment and Training Agency or Agencies and keep accurate records as to action taken on referrals from these agencies;

3. Maintain personnel records listing the names, addresses, sex and race of their employees; and require their subcontractors to do likewise.

B. The Cambridge Community Development Department shall develop, in consultation with the Employment Training Agency or Agencies, good-faith measures

by which to judge the affirmative actions of contractors operating under the provisions of this Article II. All records required to be maintained by this section shall be made available on request to representatives of said Department. All such records shall be maintained for the duration of the construction project and for one year thereafter.

C. Should a contractor be deemed not to have complied with the provisions of this Article II, nor to have made a good-faith effort to do so, it shall not be actively considered for future public construction contracts in Cambridge. (Ord. 1053 (part), 1987: prior code § 24-7)



THOMAS F. REILLY  
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

WESTERN MASSACHUSETTS DIVISION  
1350 MAIN STREET  
SPRINGFIELD, MASSACHUSETTS 01103-1629

(413) 784-1240  
www.ago.state.ma.us

COPY

May 25, 2004

Laurence R. Pizer, Town Clerk  
11 Lincoln Street  
Plymouth, MA 02360

RE: Plymouth Annual Town Meeting of April 3, 2004 — Case # #2911  
Warrant Articles # 44, 45, and 49 (General)  
Warrant Articles # 30, 31, 32, 33, 36, 40, 42 (Zoning)

Dear Mr. Pizer:

Article 49 - I return with the approval of this office the amendments to the town by-laws adopted under Article 49 on the warrant for the Plymouth annual town meeting that convened on April 3, 2004. Notwithstanding our approval, however, we must caution the town that the by-law it has adopted under Article 49 is seriously deficient in the particulars we discuss below, and poses a great risk of inconsistency with state law by the manner in which might be applied.

We must first explain the limited scope of review available to the Attorney General in considering whether a local by-law, on its face, is "inconsistent with state law." Under the provisions of G.L. c. 40, § 32, the Attorney General exercises a "limited power of disapproval," requiring that the Attorney General cite a facial inconsistency between the by-law adopted by the town and the constitution or laws of the Commonwealth before disapproving the by-law. A by-law is deemed facially inconsistent with state law – as distinct from "inconsistent as applied" – when we find no foreseeable application of the by-law that does not offend state law.

Article 89 of the Articles of Amendment of the Massachusetts Constitution, commonly known as the "Home Rule Amendment," was adopted in 1966, and conferred sweeping, yet limited, legislative autonomy upon cities and towns in the Commonwealth. Section 6 of Article 89 states:

[a]ny city or town may, by the adoption, amendment, or repeal of local . . . by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court . . .

(Emphasis added.)

Towns, therefore, may not enact by-laws that are inconsistent with the constitution and laws of the Commonwealth. "In deciding whether under Section 6 of the Home Rule Amendment a . . . by-law is not inconsistent with the constitution or laws enacted by the general court . . . we have said that '[t]he legislative intent to preclude local action must be clear.'" Town of Wendell v. Attorney General, 394 Mass. 518, 523 (1985), quoting Bloom v. Worcester, 363 Mass. 136, 155 (1973). "To determine whether a local ordinance is inconsistent with a statute, this court has looked to see whether there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject." Boston Gas Co. v. City of Newton, 425 Mass. 697, 699 (1997), citing Boston Gas Co. v. City of Somerville, 420 Mass. 702, 704 (1995).

The amendments adopted under Article 49 add a new "Responsible Contractor By-law" to the town's general by-laws. Section 1 of the Responsible Contractor By-law lists conditions and obligations that all general bidders and filed sub-bidders must comply with when bidding on certain construction projects in the Town of Plymouth, including giving "special consideration" to recruiting workers who are residents of the Town of Plymouth. Specifically, Section 1 provides in pertinent part as follows:

All general bidders and filed sub-bidders (including sub-sub-bidders) for construction projects in the Town of Plymouth and funded by the or [sic] part by the Town of Plymouth and subject to Massachusetts General Laws, Chapter 149, Section 44A(2) and as hereinafter described subject to Massachusetts General Laws, Chapter 30, Section 39M shall as a condition for bidding, agree in writing that they shall comply with the following obligations, and such obligations hereby are incorporated by reference into the specifications for the construction project and that any general bidder, filed sub-bidder or sub-sub bidder, deemed to be in non-compliance with Section 1 subsection 2 C, E, F, and H at the time of the bid shall be rejected. . . .

Hiring a.) [sic] In a manner that is consistent with applicable law and regulations, any bidder or subcontractor under a bidder awarded a project subject to this bylaw shall give special consideration to recruiting workers who are residents of the Town of Plymouth and who are qualified by craft for each apprenticeable trade or occupation represented in their workforce that is approved by the Division of Apprentice Training of the Department of Labor and Workforce Development. . . .

(Emphasis added.)

While this Section requires general bidders and filed sub-bidders to give "special consideration" to residents of the Town of Plymouth, this expression is neither defined in the by-law nor otherwise clear in its meaning. Our concern about the imprecision of this expression is augmented in light of cases in which significant legal challenges have been brought to residency requirements in public works construction contracts.

In an apparent effort to provide economic opportunities for local residents, several cities

have enacted ordinances that require contractors on public works projects to employ a minimum number of local residents on these projects. While we believe such ordinances are well-intentioned, we caution that several recent decisions have addressed such residency requirements for local public works construction projects, and have found them to be unlawful.

The United States Supreme Court has determined that residency by-laws and ordinances are properly subject to the strictures of the United States Constitution Privileges and Immunities Clause, which applies not only to laws that discriminate on the basis of state citizenship, but also to laws that discriminate on the basis of municipal residency. In New Jersey, the City of Camden's residency ordinance required that 40 percent of the employees of contractors or sub-contractors working on city construction projects be residents of the City of Camden. The residency ordinance was held to be subject to close scrutiny and presumptively unconstitutional unless there was a "substantial reason" for its discrimination against non-residents. United Bldg & Constr. Trades Council of Camden & Vicinity v. Mayor & Counsel of the City of Camden, 465 U.S. 208, 216 (1984).

In UCANE v. City of Lowell, 01-0473 (Norfolk Super Ct. 2001), a Massachusetts Superior Court invalidated Lowell's Residency Requirement Ordinance, finding that the city had conducted no research to establish that non-resident construction workers had an impact on city unemployment rates. The City of Lowell's Residency Requirement Ordinance provided that on certain construction projects 33 percent of the work hours had to be completed by Lowell residents. The Court determined that the city had "no reasonable expectation" of establishing the lawfulness of its ordinance.

More recently in UCANE v. City of Worcester, 236 F. Supp. 2d 113, 118 (D. Mass 2002), the United States District Court held that the City of Worcester's residency ordinance was unconstitutional, despite Worcester's extensive factual record establishing dramatic unemployment in that city. The City's Residency Requirement Ordinance required that all private contractors or subcontractors on certain projects allocate 50 percent of their total employee work hours to Worcester residents. While the city's compelling economic problems moved the Court, it nevertheless enjoined enforcement of the residency ordinance and ordered Worcester to pay more than \$27,000 in attorneys' fees and costs.

These cases make clear that in the absence of significant investigation, study, and strong factual support, residency requirements for public construction projects enacted by cities and towns will fail to meet the strict scrutiny test required under the Privileges and Immunities Clause of Article IV of the United States Constitution. Accordingly, the Town of Plymouth is advised to review this residency preference provision before seeking to implement it to determine its lawfulness and enforceability.

Moreover, any city or town considering whether to implement or enforce any residency requirement, should consider its cost implications. There are strong indications that residency provisions drive up the cost of construction because they reduce the number of bidders; thereby

reducing competition for work.

Although the proposed Responsible Contractor By-law adopted by the Town of Plymouth does not expressly mandate employment preference for town residents, were such a requirement adopted by Plymouth or any other municipality in the Commonwealth without significant investigation, study, and strong factual support, that mandatory preference would fail to meet the strict scrutiny test required under the Privileges and Immunities Clause of Article IV of the United States Constitution.

Plymouth's by-law differs from those dealt with by the courts not only in its absence of any quantification of the preferences intended, but also by its greater imprecision in the use of undefined expressions. We – and more importantly those who are to be bound by the by-law – are left with significant doubt as to the meaning and applicability of this provision to any particular contract made by the Town. In order to avoid a “void for vagueness” challenge, the town may wish to amend its by-laws to add a level of precision to the words “special consideration.” See O’Connell v. Brockton Board of Appeals, 344 Mass. 208, 212 (1962) (“A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” . . . And this is no less true of a municipal ordinance or regulation.”).

Even if – apart from the difficulties stemming from its vagueness and imprecision – a court were to judge Plymouth's by-law by the same standards applicable to the “mandatory minimum” ordinances implicated in prior cases, such local employment preferences could, at least in theory, still have lawful application if and when the stringent conditions laid down by the court are satisfied. For that very reason we cannot find the by-law before us facially inconsistent with state law.

We suggest that the Town discuss the issues raised above with Town Counsel before it enforces such hiring preference in public construction contracts. The courts have provided a standard – a very high standard – for the constitutionality of residency preferences, and satisfying that standard will be an absolute precondition to lawful application of the by-law before us. We strongly suggest that in your discussions with town counsel it be determined whether constitutionally adequate, town-specific studies have been undertaken and analyzed with results that meet or exceed the standard laid down by the courts. In the absence thereof, the by-law before us would be inconsistent with state law.

Articles 30, through 33, 36, 40, 42, 44, and 45 - This approval letter relates solely to the amendments to the town by-laws adopted under Article 49 of the warrant for the Plymouth annual town meeting that convened on April 3, 2003. The remaining amendments to the town by-laws adopted under Articles 30 through 33, 36, 40, 42, 44, and 45, and the maps pertaining to Articles 36, 40, and 42 have been retained for review and will be acted upon on or before August 20, 2004.


**Note:** Under G.L. c. 40, § 32, neither general nor zoning by-laws take effect until the town has

first satisfied the posting/publishing requirements of this section. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.

If the Attorney General has disapproved and deleted one or more portions of any by-law or by-law amendment submitted for approval, only those portions approved are to be posted and published pursuant to G.L. c. 40, § 32. We ask that you forward to us a copy of the final text of the by-law or by-law amendments reflecting any such deletion. It will be sufficient to send us a copy of the text posted and published by the Town Clerk pursuant to this statute.

Very truly yours,

THOMAS F. REILLY  
ATTORNEY GENERAL



by: Robert W. Ritchie, Assistant Attorney General  
Director, Municipal Law Unit  
1350 Main Street, 4<sup>th</sup> Floor  
Springfield, MA 01103-1629  
(413) 784-1240, x 116

enc.

pc:

Town Counsel

**Richard D. Wayne**  
[rwayne@haslaw.com](mailto:rwayne@haslaw.com)

February 12, 2007

Arthur J. Goldberg, Esquire  
First Assistant, Office of the City Solicitor  
City of Cambridge  
795 Massachusetts Avenue  
Cambridge, MA 02139

Re: Cambridge Residency Ordinance

Dear Solicitor Goldberg:

I am writing in response to your production of documents.

I have reviewed the same.

Based upon my review, it is my opinion, that the Cambridge Residency Ordinance is unlawful and violates the Privileges and Immunities Clause of the United States Constitution. See *United Building and Construction Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984); *Utility Contractors' Association of New England, Inc. v. City of Worcester*, September 16 F.Supp. 2d. (2003) (City of Worcester Residency Requirement filed in violation of the Privileges and Immunities Clause. City of Worcester pays attorney's fees); *Utility Contractors of New England Inc. v. City of Lowell*, Norfolk Superior Court, Civil Action No.: 2001-00473 (City of Lowell Residency Requirement found unconstitutional).

Please note further that the City's promulgation of above referenced Residency Requirement was based in part, on a false premise, specifically, that *White v. Massachusetts Council of Construction Employers, Inc.* 460 U.S. 204 (1983) permitted a City to promulgate said regulation. As stated above, see the 1984 *City of Camden* case. In regard to this "false premise," please see Appendix A, dated May 14, 1985, document produced by you which states:

"WHEREAS, a recent ruling of the United States Supreme Court enabling the City of Boston to enforce a like ordinance and that this ruling indicates that there are no legal encumbrances in creating this ordinance with the full force of law behind it, and that such law would be legitimate and valid; ..."



Arthur J. Goldberg  
February 12, 2007  
Page 2

**HinckleyAllenSnyder** LLP  
ATTORNEYS AT LAW

The City of Camden case supercedes the City of Boston case which, cleverly, did not put the Privileges and Immunities issue into play, but rather limited the appeal to the Commerce Clause issue;

Document dated April 1, 1987, from Elizabeth R. Haskell, Employment Resources, Inc. (Appendix B) states, in pertinent part:

"A major marketing/recruiting campaign was undertaken (a detailed description is attached) which included door-to-door canvassing in neighborhoods. However, at the present time, we have 245 Cambridge jobs listed with ERI (none in construction) and 79 residents looking for work. Since its inception, we have served over 750 Cambridge residents through the Cambridge Employment Program, but of this number, only 3 people have inquired about construction jobs."

Evidence available to the City of Cambridge is that resident construction workers were not unemployed in your City. Despite the same, this unconstitutional residency requirement remains.

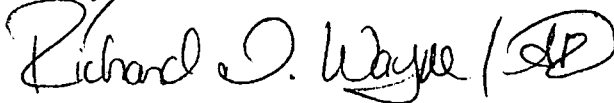
Third, enclosed please find as an enclosure (Appendix C) a letter dated 31 March 1987 from Michael H. Rosenberg, Assistant City Manager for Community Development to Robert W. Healy, City Manager in which he states, among other things:

"With all the construction taking place in the metropolitan area, it is highly likely that contractors would have a difficult time finding the required number of Cambridge workers on each of the various construction trades. This fact could result in a substantial reduction in the number of firms bidding on public contracts, thereby providing less competition and resultant higher prices on public jobs."

In conclusion, and simply stated, for all the above reasons, including efficiency, cost, and the protection of taxpayer money, we respectfully request that the City of Cambridge immediately rescind its Residency Requirement.

If you have any questions regarding this letter, please contact me at your convenience.

Sincerely,



Richard D. Wayne  
RDW:Imm  
Enclosures

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CITY OF CAMDEN  
OFFICE OF THE CITY CLERK



# City of Cambridge

18.

COUNCILLOR VELLUCCI

IN CITY COUNCIL

May 14, 1984

- WHEREAS: There are many unemployed or underemployed persons in the City of Cambridge that are both white and minority residents; and
- WHEREAS: It is evident that the City of Cambridge is experiencing a rate of construction that will create an additional thirteen thousand jobs over the next fifteen years; and
- WHEREAS: These jobs are being created as a result of contracts, many of which make use of public funds derived from taxes paid by city residents; and
- WHEREAS: The vast majority of workers employed during the construction of projects funded by public funds in part or in full, are individuals who do not reside in the City of Cambridge; and
- WHEREAS: A recent ruling by the United States Supreme Court enabling the City of Boston to enforce a like ordinance and that this ruling indicates that there are no legal encumbrances in creating this ordinance with the full force of the law behind it, and that such a law would be legitimate and valid; and
- WHEREAS: The Cambridge Employment Plan is at this time already being implemented as a voluntary plan by Employment Resources Incorporated, and as an entity funded by the City of Cambridge, is in place and competent to administer the essence of this ordinance; and
- WHEREAS: The office of the City Manager has designated that the office of Community Development, a sub-structure thereof, has purview over the areas of compliance and enforcement of all areas pertaining to labor and the fulfillment of all requirements mandated by law pertaining to construction and it is in place and competent to administer compliance and enforcement of the essence of this ordinance; now
- THEREFORE: Be it ordained as follows:

5001 LEO 12 MAY 15 1984

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MAY 15 1984  
CITY OF CAMBRIDGE

**E·R·I**

EMPLOYMENT

RESOURCES

INC.

ONE KENDALL SQ.

B-200

CAMBRIDGE

MA 02139

617/494-1154

April 1, 1987

MEMORANDUM

TO: Robert W. Healy  
City Manager

FROM: Elizabeth R. Haskell *ERH*  
President  
Employment Resources, Inc.

As indicated in Michael Rosenberg's memo to you of March 31, 1987, ERI and the Community Development Department have met on numerous occasions to develop an appropriate strategy for implementing the Construction Jobs Ordinance #1015.

We are in complete agreement with Mr. Rosenberg's memo as to the difficulties posed with respect to ~~enforcing this ordinance~~.

As to implementing a program to assure that 25% of construction jobs in Cambridge are filled by Cambridge residents, ERI has undertaken a significant effort to meet these goals.

A major marketing/recruiting campaign was undertaken (a detailed description is attached) which included door-to-door canvassing in six neighborhoods. However, at the present time, we have 245 Cambridge jobs listed with ERI (none in construction) and 79 residents looking for work. Since its inception, we have served over 750 Cambridge residents through the Cambridge Employment Program, but of this number, only 3 people have inquired about construction jobs.

Furthermore, we have canvassed the union locals working on construction in the Cambridge area. All of those contacted (see attached listings) stated that all of their members who were available for work were working. We also contacted several contractors working on projects in Cambridge and were told that they were having some difficulty manning their jobs.

We therefore must conclude that there is no lack of construction work available to Cambridge residents who want it.

We realise that these boom times may not last forever and therefore concur with Mr. Rosenberg's suggestion that the ordinance be amended to provide a firm basis for assuring Cambridge residents construction jobs should they want them.



## CITY OF CAMBRIDGE

### COMMUNITY DEVELOPMENT DEPARTMENT

City Hall Annex - Inman & Broadway - Cambridge, Mass. 02139

488-9034

31 March 1987

#### MEMORANDUM

TO: Robert W. Healy  
City Manager

FROM: Michael H. Rosenberg *MHR*  
Assistant City Manager  
for Community Development

RE: Cambridge Employment Plan  
Construction Jobs Ordinance No. 1015

Pursuant to the City Council Order of March 9, 1987 regarding the above referenced subject, and in preparation for the scheduled public hearing on the topic, I am writing to provide you with pertinent background information.

As you know, the ordinance passed on September 10, 1984 requires detailed employment quotas and reporting requirements of all contractors working on publicly funded construction jobs. The responsibility for implementing and administering this program is given to Employment Resources, Inc. (ERI) while the responsibility for enforcement is given to the Community Development Department. Shortly after the ordinance was passed, a series of meetings were held between this department and ERI to discuss the logistics of implementing and enforcing the program. It was determined that the requirements of the ordinance would be extremely difficult, if not impossible, to administer in its present form.

The reasons for the determination reached then still hold true today. Specifically, while the goals of the ordinance are clearly in the public interest, conditions existing in the construction field should be taken into account along with the potential total cost of the program.

It is important to note that we have no accurate information on the number of skilled construction workers available and in need of employment. With all the construction taking place in the metropolitan area, it is highly likely that contractors

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MARCH 31 1987  
CITY OF CAMBRIDGE

Mr. Robert Healy  
31 March 1987  
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would have a difficult time finding the required number of Cambridge workers in each of the various construction trades. This fact could result in a substantial reduction in the number of firms bidding on public contracts, thereby providing less competition and resultant higher prices on public jobs.

Further, the City lets several small jobs each year involving the use of smaller contractors. Such a requirement would possibly exclude most of these contractors from bidding on jobs due to their inability to comply with the ordinance. As you know, the City is already having problems with receiving competitive bids due to the large amount of construction taking place in the area. We often have to wait to bid on jobs until winter to obtain a bid within budget. Several times in the past year, we have had jobs where only one or two contractors have submitted bids. It is clear that most contractors have more work than they can handle. If the City were to impose additional requirements on its construction contracts, this would further curtail our ability to build these projects within a reasonable budget.

In terms of enforcing such an ordinance, we would be hard pressed to effectively monitor the program with existing personnel. For example, in calendar year 1986, the City bid out 38 construction contracts valued in excess of \$10,000,000. This figure does not include the several smaller rehabilitation jobs carried out by subgrantees such as Just-A-Start, Homeowners Rehab or Riverside Cambridgeport Community Corporation. Within these 39 contracts, over 40 subcontracts were involved. At a minimum, therefore, our department would be responsible for processing and reviewing thousands of payroll reports every year. Given our limited staffing resources, we would be unable to carry out this task. Such an effort would require increased funding from the City and we should examine whether the benefits to be realized are worth the additional costs in this time of fiscal restraint. I would further question whether our department, which is a planning and development agency, is the appropriate department for enforcing this ordinance.

Rather than continue to dwell on the issue of why the ordinance cannot be enforced, however, I think it would be more productive to discuss ways that the ordinance can be modified in such a way to be more manageable, yet at the same time meet the desired goals, namely employment for Cambridge residents in the construction industry. In conjunction with ERI, we have prepared an alternate ordinance (attached) which attempts a different approach to the issue. This new ordinance would put the City in the position of working with the contractors

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MARCH 31 1987

Mr. Robert W. Healy  
31 March 1987  
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to increase construction employment opportunities for Cambridge citizens as opposed to putting us in the position of having to penalize those who cannot or will not comply. It would seem to me that such an approach would be definitely more desirable, while at the same time be less costly and most likely accomplish the same result.

I would therefore request that the Council consider this alternative ordinance as part of its discussion in an attempt to find a workable solution to this important issue.

MHR/jk

Attachment

cc: Elizabeth Haskell, ERI

3021 FEB 12 A 10 30

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